Mohd Alif Anas bin Md Noor (in his capacity as President, and on behalf of Gabungan Pelajar Melayu Semenanjung (GPMS)) & Ors v Menteri Pendidikan Malaysia and another suit

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS WA-21NCVC-84–12 OF 2019 AND WA-21NCVC-2–01 OF 2020
MOHD NAZLAN J
21 MARCH 2022

Constitutional Law — Legislation — Validity of impugned legislation — Whether ss 2, 17 and 28 of Education Act 1996 ('the EA') contravened art 152(1) of Federal Constitution ('the FC') and were void to the extent they allowed Chinese and Tamil languages to be used as medium of instruction in vernacular schools — Whether usage of Chinese and Tamil languages in vernacular schools for teaching and learning was protected, preserved and sustained by provisos (a) and (b) to art 152(1) — Whether such usage could not be construed to be for an 'official purpose' as vernacular schools were not statutory or public authorities — Whether establishment and existence of vernacular schools in Malaysia was not inconsistent with arts 5, 8, 10, 11 and 12 of the FC

The plaintiffs in the two suits herein sought to declare that: (a) ss 2, 17 and 28 of the Education Act 1996 ('the EA') were contrary to art 152(1) of the Federal Constitution ('the FC') and void to the extent they permitted the establishment of national-type (vernacular) schools where Chinese or Tamil languages were used as the medium of instruction; (b) the existence of such schools was inconsistent with arts 5, 8, 10, 11 and 12 of the FC; and (c) the first and second defendants do all things necessary to ensure the existence of such schools accorded with art 152(1) of the FC. By consent of the parties, the court determined the suits without trial under O 14A of the Rules of Court 2012 by answering the following two questions of law: (i) whether ss 2, 17 and 28 of the EA were inconsistent with art 152(1) of the FC; and (ii) whether the establishment and existence of Chinese and Tamil national-type schools was inconsistent with arts 5, 8, 10, 11 and 12 of the FC. Section 2 of the EA defined a national-type school as a government or government-aided primary school which: (A) provided primary education appropriate for pupils from the age of six years; (B) used the Chinese or Tamil language as the main medium of instruction; and (C) taught the national (Malay) and English languages as compulsory subjects in their curriculum. Section 17 of the EA essentially provided that the national language shall be the main medium of instruction in all educational institutions in the National Education System except a national-type school established under s 28 of the EA or any other educational institution exempted by the Minister from the application of s 17(1).

Section 28 of the EA empowered the Education Minister to establish and maintain national and national-type schools. Article 152(1) of the FC declared that the national language shall be the Malay language provided that: (1) no person shall be prohibited or prevented from using (otherwise than for official purposes), or from teaching or learning any other language; and (2) nothing in art 152(1) shall prejudice the right of the Federal or State governments to preserve and sustain the use and study of the language of any other community in the Federation. The phrase 'official purposes' in s 152(1)(a) was defined in art 152(6) as meaning any purpose of the Federal or State governments and including any purpose of a public authority.

Held, answering both questions of law in the negative and dismissing the suits:

(1) In view of the historical and legislative background to art 152 of the Federal Constitution and the intention of the framers of the Constitution, the use of a non-Malay medium of instruction for teaching in Chinese and Tamil vernacular schools was not for an official purpose and was not an infringement of art 152(1). Such use of the language was not unconstitutional and was protected under the FC by virtue of provisos (a) and (b) to art 152(1). A true and proper interpretation of those provisos did not prevent the establishment and maintenance of vernacular schools or prohibit the use of other languages in such schools. Instead, the provisos to art 152(1) were inserted to achieve the opposite effect (see paras 111 & 142–143).

(2) The existence of Chinese and Tamil vernacular schools in Malaysia had long pre-dated the Federal Constitution itself. Even before independence, the establishment and existence of vernacular schools had a long history of recognition and acceptance in this country. Thereafter, the national education policy continued to recognise national-type vernacular schools as part of the national education system alongside national primary schools. The position of Malay as the national language was expressly intended not to affect the use of other languages in the education system of the country, as made very clear in the provisos to art 152(1) of the FC (see paras 24, 32 & 43).

(3) A vernacular school was neither a statutory authority nor a public authority. Consequently, its use of a non-Malay medium of instruction for teaching was not for an 'official purpose' and was therefore protected by the proviso in art 152(1)(a) of the FC (see para 93).

(4) The Constitution (Amendment) Act 1971 which inserted cl (6) in art 152 to define 'official purpose' showed that it was not intended to affect the use of other languages in vernacular schools. Throughout the course of the parliamentary debates, there was no allusion, let alone any

mention. that the new art 152(6) was intended to abolish vernacular schools or prohibit the use of non-Malay languages as their medium of instruction (see paras 112–113).

(5) Under proviso (b) of art 152(1) of the FC, Federal and State governments had the right to preserve and sustain the use and study of the language of any other community in the Federation. The exercise of this constitutional right was not only confined to the study of those languages but also their use which, in this court's view, included their use as a medium of instruction. In cases involving fundamental constitutional rights, such as the right to education, the courts would interpret the relevant constitutional provisions generously and liberally. In addition, applying a prismatic approach to the construction of constitutional provisions, this court would construe 'the use' of such languages referred to in art 152(1)(b), in so far as it concerned vernacular schools, to encompass the use of Chinese or Tamil as a medium of instruction to teach other subjects (see paras 99 & 102–103).

(6) Given that the use of Chinese and Tamil in vernacular schools as a medium of instruction was constitutional and protected under provisos (a) and (b) of art 152(1) of the FC, there was no basis to contend that the establishment and existence of vernacular schools was inconsistent with or infringed arts 5, 8, 10, 11 and 12 of the FC. The plaintiffs had not shown in what way the establishment and existence of vernacular schools had violated the fundamental rights or liberties of any person under the aforesaid articles. This was especially given the fact that enrolment in a vernacular school was not compulsory but a matter of choice, a purely voluntary act (see paras 125–126 & 128).

[Bahasa Malaysia summary

Plaintif dalam dua tindakan di sini memohon untuk mengisytiharkan bahawa: (a) ss 2, 17 dan 28 Akta Pendidikan 1996 ('Akta') adalah bertentangan dengan perkara 152(1) Perlembagaan Persekutuan ('PP') dan tidak sah setakatmana mereka membenarkan penubuhan sekolah jenis kebangsaan (vernakular) di mana bahasa Cina atau Tamil digunakan sebagai bahasa pengantar; (b) kewujudan sekolah tersebut tidak selaras dengan perkara 5, 8, 10, 11 dan 12 PP; dan (c) defendan pertama dan kedua melakukan semua perkara yang perlu untuk memastikan kewujudan sekolah tersebut menurut perkara 152(1) PP. Dengan persetujuan pihak-pihak, mahkamah memutuskan saman tanpa bicara di bawah A 14A Kaedah-Kaedah Mahkamah 2012 dengan menjawab dua persoalan undang-undang berikut: (i) sama ada ss 2, 17 dan 28 Akta tidak konsisten dengan perkara 152(1) PP; dan (ii) sama ada penubuhan dan kewujudan sekolah jenis kebangsaan Cina dan Tamil tidak selaras dengan perkara 5, 8, 10, 11 dan 12 PP. Seksyen 2 Akta memberikan definisi sekolah jenis kebangsaan sebagai sekolah rendah kerajaan atau bantuan kerajaan yang (A) menyediakan pendidikan rendah yang sesuai untuk murid-murid dari

umur enam tahun; (B) menggunakan bahasa Cina atau Tamil sebagai bahasa pengantar utama pembelajaran; dan (C) mengajar bahasa kebangsaan (Melayu) dan Inggeris sebagai mata pelajaran wajib dalam kurikulum mereka. Seksyen 17 Akta pada asasnya memperuntukkan bahawa bahasa kebangsaan hendaklah menjadi bahasa pengantar utama di semua institusi pendidikan dalam Sistem Pendidikan Kebangsaan kecuali sekolah jenis kebangsaan yang ditubuhkan di bawah s 28 Akta atau mana-mana institusi pendidikan lain yang dikecualikan oleh Menteri daripada pemakaian s 17(1). Seksyen 28 Akta memberi kuasa kepada Menteri Pendidikan untuk menubuhkan dan menyelenggara sekolah kebangsaan dan jenis kebangsaan. Perkara 152(1) PP mengisytiharkan bahawa bahasa kebangsaan adalah Bahasa Melayu dengan syarat (a) tiada sesiapa pun boleh dilarang atau dihalang daripada menggunakan (selain daripada untuk tujuan rasmi), atau daripada mengajar atau mempelajari bahasa lain, dan (b) tiada apa pun dalam perkara 152(1) boleh menjejaskan hak kerajaan Persekutuan atau Negeri untuk memelihara dan mengekalkan penggunaan dan pengajian bahasa mana-mana komuniti lain di Persekutuan. Frasa 'tujuan rasmi' dalam s 152(1)(a) didefinisikan dalam perkara 152(6) sebagai bermaksud sebarang tujuan kerajaan Persekutuan atau Negeri dan termasuk apa-apa tujuan pihak berkuasa awam.

Diputuskan, menjawab kedua-dua persoalan undang-undang secara negatif dan menolak tindakan tesebut:

(1) Merujuk kepada latar belakang sejarah dan perundangan kepada perkara 152 Perlembagaan Persekutuan ('PP') dan hasrat penggubal Perlembagaan, penggunaan bahasa pengantar bukan Melayu untuk pembelajaran di sekolah vernakular Cina dan Tamil adalah bukan untuk tujuan rasmi dan bukan pelanggaran perkara 152(1). Penggunaan bahasa tersebut tidak bertentangan dengan Perlembagaan dan dilindungi di bawah PP berdasarkan peruntukan (a) dan (b) kepada perkara 152(1). Tafsiran yang benar dan betul terhadap peruntukan tersebut tidak menghalang penubuhan dan penyelenggaraan sekolah vernakular atau melarang penggunaan bahasa lain di sekolah tersebut. Sebaliknya, peuntukkan kepada perkara 152(1) telah dimasukkan untuk mencapai kesan yang bertentangan (lihat perenggan 111 & 142–143).

(2) Kewujudan sekolah vernakular Cina dan Tamil di Malaysia telah lama mendahului Perlembagaan Persekutuan tersebut sendiri. Malah sebelum kemerdekaan, penubuhan dan kewujudan sekolah vernakular mempunyai sejarah pengiktirafan dan penerimaan yang panjang di negara ini. Selepas itu, dasar pendidikan kebangsaan terus mengiktiraf sekolah vernakular jenis kebangsaan sebagai sebahagian daripada sistem pendidikan kebangsaan bersama sekolah rendah kebangsaan. Kedudukan Bahasa Melayu sebagai bahasa kebangsaan secara jelas bertujuan untuk tidak menjejaskan penggunaan bahasa lain dalam sistem pendidikan negara, seperti yang dinyatakan dengan jelas dalam

peruntukkan perkara 152(1) PP (lihat perenggan 24, 32 & 43).

(3) Sekolah vernakular bukanlah pihak otoriti berkanun mahupun otoriti awam. Akibatnya, penggunaan bahasa pengantar bukan Melayu untuk pembelajaran bukanlah untuk 'tujuan rasmi' dan oleh itu dilindungi oleh peruntukan dalam perkara 152(1)(a) PP (lihat perenggan 93).

(4) Akta Perlembagaan (Pindaan) 1971 yang memasukkan klausa (6) dalam perkara 152 untuk mentakrifkan 'tujuan rasmi' menunjukkan bahawa ia tidak bertujuan untuk menjejaskan penggunaan bahasa lain di sekolah vernakular. Sepanjang perbahasan parlimen berlangsung, tiada kiasan, apatah lagi sebutan bahawa perkara baharu 152(6) bertujuan untuk menghapuskan sekolah vernakular atau melarang penggunaan bahasa bukan Melayu sebagai bahasa pengantar mereka (lihat perenggan 112–113).

(5) Di bawah peruntukan (b) perkara 152(1) PP, kerajaan Persekutuan dan Negeri mempunyai hak untuk memelihara dan mengekalkan penggunaan dan kajian bahasa mana-mana komuniti lain di Persekutuan. Penggunaan hak Perlembagaan ini bukan sahaja terhad kepada kajian bahasa tersebut tetapi juga penggunaannya yang, pada pandangan mahkamah ini, termasuk penggunaannya sebagai bahasa pengantar. Dalam kes yang melibatkan hak asasi Perlembagaan, seperti hak untuk mendapat pendidikan, mahkamah akan mentafsir peruntukan Perlembagaan yang berkaitan secara senang dan bebas. Di samping itu, menggunakan pendekatan prismatik kepada pembinaan peruntukan Perlembagaan, Mahkamah ini akan menafsirkan 'penggunaan' bahasa sedemikian yang disebut dalam perkara 152(1)(b), setakat yang melibatkan sekolah vernakular, merangkumi penggunaan Bahasa Cina atau Tamil sebagai bahasa pengantar untuk mengajar mata pelajaran lain (lihat perenggan 99 & 102–103).

(6) Memandangkan penggunaan bahasa Cina dan Tamil di sekolah vernakular sebagai bahasa pengantar adalah mengikut Perlembagaan dan dilindungi di bawah peruntukan (a) dan (b) perkara 152(1) PP, tidak ada asas untuk menegaskan bahawa penubuhan dan kewujudan sekolah vernakular tidak konsisten dengan atau melanggar perkara 5, 8, 10, 11 dan 12 PP. Plaintif tidak menunjukkan bagaimana penubuhan dan kewujudan sekolah vernakular telah melanggar hak asasi atau kebebasan mana-mana orang di bawah perkara yang disebut di atas. Ini terutamanya memandangkan hakikat bahawa pendaftaran di sekolah vernakular bukanlah wajib tetapi merupakan perkara pilihan, tindakan sukarela semata-mata (lihat perenggan 125–126 & 128).]

Cases referred to

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1, FC (refd)
Che Omar bin Che Soh v PP [1988] 2 MLJ 55, SC (refd)

Dato' Menteri Othman bin Baginda v Dato' Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (refd)
Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor [2021] 6 MLJ 68; [2021] 7 AMR 533, FC (refd)
Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia [2013] 2 MLJ 321, FC (refd)
Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Letitia Bosman v PP and other appeals (No 1) [2020] 5 MLJ 277, FC (refd)
Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145, FC (refd)
Manoharan a/l Malayalam & Anor v Dato' Seri Mohd Najib bin Tun Hj Abdul Razak & Ors [2013] 5 MLJ 186,CA (refd)
Matadeen and Others v MGC Pointu and Others (Mauritius) [1998] UKPC 9, PC (refd)
Merdeka University Berhad v Government of Malaysia [1981] 2 MLJ 356, HC (refd)
Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243, FC (distd)
Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor [2020] 1 MLJ 398, FC (refd)
PP v Mark Koding [1983] 1 MLJ 111, HC (refd)
PP v Su Liang Yu [1976] 2 MLJ 128 (refd)
Regina v British Broadcasting Corporation ex parte Pro-Life Alliance [2003] 2 All ER 977, HL (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (refd)

Legislation referred to

Criminal Procedure Code s 418B
Education Act 1961 (repealed by Education Act 1996) ss 2, 20, 21
Education Act 1996 ss 2, 17, 17(2), 20, 21, 28, 79(1), (2), (3), 84, 87(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f)
Education Ordinance 1957
Federal Constitution arts 4(1), (4), 5, 6, 8, 10, 10(4), 11, 11(4), 12, 12(1), 15(2), 63, 72, 74, 128(1), 140(1), (2), 152, 152(1), (1)(a), (1)(b), (2), (3), (4), (5), (6), 153, 156, 159, 160(2), Part II, Ninth Schedule, List I, item 13, List III
National Language Act 1963/67 s 2
Rules of Court 2012 O 14A, O 14A r 1
Sedition Act 1948
Universities and University Colleges Act 1971 ss 3, 6, 7, 11, 15A, 15D, Schedule

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M Reza Hassan (with Muna Farhana Zainuddin, Nurin Husnina and Rahim Sinwan) (Raja Riza & Assoc) for the third plaintiff.
Narkunavathy Sundareson (with Suzana bt Atan, Liew Horng Bin and Mohamad Sallehuddin bin Md Ali) (Attorney General's Chambers) for the first and second defendants.
Alison Goh Poi Sze (KK Mak & Co) for the third defendant.
Vasanthi Arumugam (with Vischaal Yogaratnam) (Vas & Co) for the fourth defendant.
Ben Chan Chong Choon (with Syazwani Mahmud) (Ben Chan) for the fifth defendant.
KF Wong (with HS Lim and YS Lim) (KF Wong & Lee) for the sixth and seventh defendants.
Arthur Wang Ming Way (with Siow Pui Yee) (Arthur Wang Lian & Assoc) for the eighth defendant.
Dheebak Kumaran (with MJ Ganesan) (J Ganeson Tajul Annuar & Co) for the ninth defendant.
M Saravanan (with M Mathialagan) (Madhi Param & Co) for the tenth defendant.
RV Lingam (with Rajoo Kuppan) (RV Lingam & Co) for the 11th defendant.
Gopal Sri Ram (with T Gunaseelan) (Gunaseelan & Assoc) for the 13th defendant.
Mansoor Saat watching brief for SUHAKAM.
Haziq Aizuddin Subhi watching brief for PERKASA.

Mohd Nazlan J:

INTRODUCTION

[1] These two suits essentially sought to declare that the existence of vernacular schools in this country is against the Federal Constitution. This court heard these suits under O 14A of the Rules of Court 2012 by way of examining the approved questions of law, principally on whether the statutory provisions governing vernacular schools are contrary to the Federal Constitution and whether the existence of the vernacular schools infringe certain other constitutional provisions.

[2] At the end of the hearing of the questions under the O 14A proceedings, which were held in open court for over two days, I answered the questions in the negative, highlighted my main reasons for the same, and consequently ordered that both the suits be dismissed. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

[3] The first plaintiff in the first suit ('Suit 84') is the President of Gabungan Pelajar Melayu Semenanjung ('GPMS') and is suing on its behalf, whilst the

second plaintiff is the Secretary of Majlis Pembangunan Pendidikan Islam Malaysia ('MAPPIM') and is suing on its behalf. The third plaintiff is a representative of Gabungan Persatuan Penulis Nasional Malaysia ('GAPENA'). The plaintiff in the second suit ('Suit 2') is the chairman of Pertubuhan Ikatan Muslimin Malaysia ('ISMA'), also suing on behalf of the association.

[4] The plaintiffs filed these writ actions in Suit 84 and Suit 2 primarily against the original two defendants, namely the Minister of Education and the Government of Malaysia, and in their statements of claim essentially sought the following reliefs:

(a) a declaration that ss 2, 17 and 28 of the Education Act 1996, to the extent these provisions permit the establishment of national type schools — Chinese and Tamil national schools which conduct teaching and learning in the Chinese and Tamil language in their respective medium of instructions, is contrary to art 152(1) of the Federal Constitution and is therefore invalid and void to the extent of the said contradiction;

(b) a declaration that the existence of national type Chinese and Tamil schools have further also resulted in a situation that is inconsistent with art 5 (the right to life or personal liberty), art 8 (right to equality), art 10 (right to freedom of speech, assembly and association), art 11 (freedom of religion), and art 12 (rights in respect of education) of the Federal Constitution; and

(c) a declaration that the first and second defendants shall take all steps necessary to ensure that the existence of national type Chinese and Tamil schools existing in Malaysia, shall be in accordance with art 152(1) of the Federal Constitution, within six years from the date of this decision.

[5] Given the same underlying issues and common main defendants, parties agreed for the two actions — Suit 84 and Suit 2 — to be heard together. By agreement also, several other parties, who initially applied to intervene in these suits, are made as additional defendants in this action. These defendants (with the exception of PUTRA, the twelfth defendant in Suit 84 and third defendant in Suit 2, who later withdrew) are associations which essentially promote Chinese and Tamil education in the country, and also including political parties.

[6] I then allowed the application by the first and second defendants, the sixth and seventh defendants, and the 13th defendant, supported by all the other defendants in Suit 84 (and similarly in Suit 2) for the suits filed by the plaintiffs to be disposed of by way of the determination of the following questions of law pursuant to O 14A r 1 of the Rules of Court 2012 ('the RC 2012'):

A (a) whether ss 2, 17 and 28 of the Education Act 1996 are inconsistent with art 152(1) of the Federal Constitution; and

(b) whether the establishment and existence of Chinese and Tamil national type schools is inconsistent with arts 5, 8, 10, 11 and 12 of the Federal Constitution.

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[7] I have also accepted that there are two other questions, as proposed by the first and second defendants, which they say the answers to which would do away with the need to address the above two main questions. I held that these C would be subsumed under the two main questions. These two other questions are first, whether the plaintiffs have locus standi to initiate these writs and secondly whether the matters in contention are justiciable.

THE CONSTITUTIONAL CHALLENGE

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[8] The most critical question for determination in the two suits before this court is whether ss 2, 17 and 28 of the Education Act 1996 are inconsistent with art 152(1) of the Federal Constitution. This is attributed to the core of the case of the plaintiffs in these suits that vernacular schools — their E establishment and existence — is unconstitutional, and shall to the extent of the inconsistency, be void under art 4(1) of the Federal Constitution.

[9] In the parlance of constitutional challenge, this action is a form of an F 'inconsistency challenge' which can be heard by the High Court as opposed to an 'incompetency challenge' which can only be heard in the exclusive original jurisdiction of the Federal Court under art 128(1) of the Federal Constitution, and which action can only be commenced with leave of a judge of the Federal Court under art 4(4) of the Federal Constitution.

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[10] The key contention of the plaintiffs is that these statutory provisions, as enacted by Parliament in the Education Act 1996, infringe art 15(2) of the Federal Constitution. In the final analysis therefore these two suits concern the true interpretation of art 15(2) of the Federal Constitution.

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[11] On the one hand, the plaintiffs argued the said article prohibits the use of Chinese and Tamil as the medium of instruction since art 152 states that Malay is the national language in primary schools. The defendants submitted the exact opposite — that the article instead preserves such medium of I instructions in vernacular schools.

[12] To start with, when dealing with interpretation of constitutional provisions, I think it useful to highlight four important points. The first is the presumption of constitutionality, where the courts will apply the presumption

of constitutional validity when examining if any legislative enactment violates the Federal Constitution. The courts in other words must presume that Acts legislated by Parliament to be constitutional.

[13] In the case of *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 which concerns s 418B of the Criminal Procedure Code on the power of the public prosecutor to transfer a criminal case registered in a subordinate court to the High Court by issuance of certificate, Hashim Yeop A Sani J (as he then was) said thus:

> There is always a presumption in favour of constitutionality of an enactment and the burden is upon him who attacks the enactment to show that there has been a clear transgression of the constitutional principles.

[14] Secondly, in cases involving fundamental constitutional rights, the relevant provisions in the Federal Constitution should be generously and liberally interpreted. The courts have a duty to adopt a prismatic approach when required to interpret such rights (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631).

[15] Thirdly, constitutional provisions must be interpreted and properly appreciated in light of their historical background and context, in order to find out the original intention of the drafters (see *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55). The importance of this approach is emphasized by the Privy Council in *Matadeen and Others v MGC Pointu and Others (Mauritius)* [1998] UKPC 9 which considered an appeal against the decision of the Supreme Court of Mauritius where Lord Hoffmann made the following important observation:

> ... It has often been said, in passages in previous opinions of the Board too familiar to need citation, that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. *The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account.* Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution ... (Emphasis added.)

[16] The fourth point is the related principle that judicial precedent plays a lesser part than is the case in ordinary statutory interpretation, for the Federal Constitution is a living piece of legislation, where constitutional provisions are to be construed broadly and generously, not narrowly nor rigidly (see *Dato' Menteri Othman bin Baginda v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, and more recently *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277).

[17] With these important principles in mind, I now examine the questions framed under O 14A and consider the issues raised by the parties in support of their rival positions.

ANALYSIS AND FINDINGS OF THIS COURT

First question — Whether ss 2, 17 and 26 of the Education Act 1996 are inconsistent with art 152(1) of the Federal Constitution

The statutory provisions subject to challenge

[18] Section 2 of the Education Act 1996 ('the EA') defines a national-type school as a government or government-aided primary school:

(a) providing primary education appropriate for pupils from the age of six years;

(b) using the Chinese or Tamil language as the main medium of instruction; and

(c) in which the national and English languages are compulsory subjects of instruction;

[19] It therefore is predominantly a primary school using the Chinese or Tamil language as the main medium of instruction, with the national and English languages being compulsory subjects.

[20] Section 17 prescribes the national language as the main medium of instruction in the national education system except in national-type school. But where the medium of instruction is not the national language, the national language must be taught as a compulsory subject. It reads:

17 National language as the main medium of instruction

(1) The national language shall be the main medium of instruction in all educational institutions in the National Education System except a national-type school established under section 28 or any other educational institution exempted by the Minister from this subsection.

(2) Where the main medium of instruction in an educational institution is other than the national language, the national language shall be taught as a compulsory subject in the educational institution.

[21] Section 28 on the other hand, empowers the Minister of Education to establish and maintain national and national-type schools:

28 Establishment and maintenance of national and national-type schools

Subject to the provisions of this Act, the Minister may establish national schools and national-type schools and shall maintain such schools.

[22] These are the relevant statutory provisions which are now subject to a constitutional challenge. This essentially is the law on the status of vernacular schools at present.

Historical background — A summary

[23] It is imperative that some reference of relevance, albeit in summary fashion, is made to the historical background of this important subject of vernacular schools in Malaysia that has since consequent upon the present position. As stated earlier, the historical context provides a useful insight into the original intention of the drafters of the constitutional provisions.

[24] The starting point of an examination of the historical background of vernacular schools in this country will observe that the existence of these schools has long pre-dated the Federal Constitution itself. The Annual Report of Education in the Federated Malay States for the Year 1935 recorded that the earliest known Chinese school in Malaya was set up in 1815, whilst Tamil Schools started from the 1870s.

[25] The Proceedings of Advisory Council of the Malayan Union No 53 held on 10 and 11 December 1946 recorded that the Malayan Union government post Japanese Occupation formulated a national education scheme which provided for free primary education for six years, with the mother tongue in Malay, Chinese, Tamil and English as the medium of instruction. The record also stated that:

In every possible way the essential unity of the various sections of the Primary School will be stressed so that the school may provide a preparation for united service for the country and for the creation of a sense of common citizenship.

[26] The next important development was the Report of the Committee on Malay Education, Federation of Malaya or the *Barnes Report*, published in 1951 which in clear terms proposed for the establishment of a unified primary

school system with a view to building a common Malayan nationality. This would invoke a single type of national school when only Malay and English would be taught and where vernacular schools would be abolished in stages.

[27] On the other hand, in the report of a mission invited by the Federal Government to study the problem of the Education of Chinese in Malaya, presented in June also in 1951 or the *Fenn-Wu Report* proposed a trilingual education in Malay, English and Chinese.

[28] Soon after, the Central Advisory Committee on Education studied both the reports and published in September 1951 its own proposals in the Report on the Barnes Report on Malay Education and the Fenn-Wu Report on Chinese Education. Essentially, the committee had proposed that for Chinese and Indian children in the primary schools in the national education curriculum, the medium of instructions should be in Chinese and Tamil respectively.

[29] A subsequent key development pre-Merdeka is the publication of the Report of the Education Committee 1956 or the *Razak Report*, which proposed, among others that the objective ought to be to establish 'a national education system acceptable to the people of the Federation, having regard to the intention to make Malay the national language whilst preserving and sustaining the growth of the language and culture of other communities living in the country'.

[30] Further, the national education system should consist of standard primary schools with Malay as the medium of instruction, as well as standard-type primary schools using English, Tamil or Mandarin as the medium of instruction, with both standard primary schools and standard-type primary schools to be categorised as assisted schools and treated alike vis a vis grants, as well as the use of a common content syllabus by all primary schools to orientate all schools to a Malaysian outlook.

[31] In one of its concluding remarks, the Razak Report stated thus:

> 184. In the words of our terms of reference we put forward these proposals for the consideration of the Government as 'a national system of education acceptable to the people of the Federation as a whole which will satisfy their needs and promote their cultural, social, economic and political development as a nation, having regard to the intention to make Malay the national language of the country whilst preserving and sustaining the growth of the language and culture of other communities living in the country'.
>
> ...

186. We believe that an education policy 'acceptable to the people as a whole' must provide for at least two thing: it must satisfy the legitimate aspirations of each of the major cultural groups who have made their home in Malaya and it must offer the prospect of a place in a school for every child born in this country'.

[32] Accepted by the Federal Legislative Council in June 1956, the objective set out in the Razak Report became the educational policy of the Federation, and soon after was much followed in the provisions enacted in the Education Ordinance 1957. The above developments thus plainly show that even prior to independence, the establishment and existence of vernacular schools have a long history of recognition of the acceptance in Malaya.

[33] A concomitant development of greater importance was the establishment of the Federation of Malaya Constitutional Commission or the Reid Commission to examine and make recommendations for a Federal Constitution. An especially crucial facet relevant for present purposes is the drafting history of art 15(2) of the Federal Constitution. Particularly on the concepts of national language and official language.

[34] The Alliance Party, in its memorandum to the Reid Commission dated 27 September 1956 had proposed that in respect of language, that Malay should be the national and official language of Malaysia, but that the same should not prejudice the Alliance Party's policy of preserving and sustaining other languages in the education system of the country.

[35] Based on the Alliance Memorandum, the proposed status of Malay as the 'national and official language' was expressly intended to preserve and sustain, and not to affect, the continued use of other languages in the 'education system of the country'. This is in line — and virtually identical in wording — with the contemporaneous national education policy as stated in the Razak Report. The only discussions raised as to the usage of other languages concerned the 'conduct of Government business' and in legislative Councils.

[36] Their Highnesses the Rulers also submitted constitutional proposals to the Reid Commission in September 1956, which stated that the official languages should be Malay and English, and this would mean one language of the courts and the languages used by all the constitutional governments.

[37] As a result, in the second draft of the constitution by the Reid Commission, the provision for 'official language' in the draft art 140(1) and (2) made reference to the languages to be used in Parliamentary or State Legislative Council debates, and in the authoritative texts of written laws.

[38] The point for present purposes however is that the scope of matters considered in the text of 'official language' were the legislative debates, authoritative texts of law, and proceedings in court. No reference was made to the languages used in the education system.

[39] However, the changes in respect of national language proposed to the Reid Commission recommendations were explained in the white paper ('White Paper'):

> National language
>
> 61. It is proposed to make three changes in the recommendations of the Commission on the subject of the national language. First, it is proposed to provide that no person shall be prohibited or prevented from using (otherwise than for official purposes) or from teaching or learning any language. Secondly, it is proposed that the Federal and State Governments shall have the right to preserve and sustain the use and study of the language of any community of the Federation. Thirdly, it is proposed not to accept the recommendation of the Commission that for a period of ten years there should be a limited right to speak in a Legislature in a Chinese or Indian language.

[40] The White Paper recommendations, very significantly, were the progeny of art 152(1) of the Federal Constitution, the very constitutional provision the plaintiffs say ss 2, 17 and 28 of the EA infringe. Article 152(1) reads as follows:

> 152 National language
>
> (1) The national language shall be the Malay language and shall be in such script as Parliament may by law provide:
>
> Provided that —
>
> (a) no person shall be prohibited or prevented from using (otherwise than for official purposes), or from teaching or learning, any other language; and
>
> (b) nothing in this Clause shall prejudice the right of the Federal Government or of any State Government to preserve and sustain the use and study of the language of any other community in the Federation.

[41] Whereas the second draft of the Reid Commission concerning the official language as mentioned above may now be found in the rest of the same art 152, in art 152(2) to (5), as follows:

> (2) Notwithstanding the provisions of Clause (1), for a period of ten years after Merdeka Day, and thereafter until Parliament otherwise provides, the English language may be used in both Houses of Parliament, in the Legislative Assembly of every State, and for all other official purposes.

(3) Notwithstanding the provisions of Clause (1), for a period of ten years after Merdeka Day, and thereafter until Parliament otherwise provides, the authoritative texts — A

(a) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament; and

B

(b) of all Acts of Parliament and all subsidiary legislation issued by the Federal Government, shall be in the English language.

(4) Notwithstanding the provisions of Clause (1), for a period of ten years after Merdeka Day, and thereafter until Parliament otherwise provides, all proceedings in the Federal Court, the Court of Appeal or a High Court shall be in the English language: C

Provided that, if the Court and counsel on both sides agree, evidence taken in language spoken by the witness need not be translated into or recorded in English.

(5) Notwithstanding the provisions of Clause (1), until Parliament otherwise provides, all proceedings in subordinate courts, other than the taking of evidence, shall be in the English language. D

(6) In this Article, 'official purpose' means any purpose of the Government, whether Federal or State, and includes any purpose of a public authority.

E

[42] It is worthy of emphasis that not only has this version of art 152 remained substantively unamended since its promulgation, but that again, it shows that vernacular schools have a long history of existence and recognition prior to independence. F

[43] The national education policy in 1957 continued to recognise national-type vernacular schools as part of the national education system alongside national primary schools. The position of Malay as the national language was expressly intended not to affect the use of other languages in the education system of the country, as made very clear in the proviso to art 152(1) of the Federal Constitution, which instead seeks to preserve the use of other languages in vernacular schools. G

[44] Subsequently, based on another important document in the nation's education history — the *Rahman Talib Report*, the Education Act 1961 was enacted. This observation from the Rahman Talib Report merits reproduction: H

Primary education in each of the four main languages of the country is provided in the language-medium of the parent's choice in primary schools receiving full assistance. Full assistance means that the entire cost of these schools is met from public funds. Faith is thus kept with the promise to preserve and sustain the four main languages and cultures of Malaya. I

> Common syllabuses and timetables have been promulgated for use in all schools including these primary schools so that whatever language is used, all pupils learn the same things in the same way with the object of fostering a national Malayan outlook.
>
> In these ways, the desires of Malaya's main racial groups are reconciled with the needs of the Malayan nation, in primary schools attended by all the nation's children.

[45] The Education Act 1961 imposed a duty on the Minister to secure the provision of primary education in national primary schools and national-type primary-schools (s 20). The Minister may establish national and national-type primary schools, and shall maintain all such schools (s 21). National-type primary schools (*sekolah jenis kebangsaan*) was defined to mean, among other requirements, a fully-assisted primary school providing a six-year course of primary education using the English, Chinese or Tamil language as the main medium of instruction (s 2).

[46] Crucially, these provisions are the precursor to the impugned ss 2, 17 and 28 in the Education Act 1996. More on this core issue later.

[47] I should briefly deal with art 152(6), which was incorporated by the Constitution (Amendment) Act 1971. This additional provision to art 15(2) of the Federal Constitution reads:

> (6) In this Article, 'official purpose' means any purpose of the Government, whether Federal or State, and includes any purpose of a public authority.

[48] The explanatory statement to the Constitution (Amendment) Bill 1971 simply states, at para (c):

> Clause 5 amends Article 152 to define the term 'official purpose' to provide that National Language shall be used for purposes of all public authorities.

[49] In the course of the parliamentary debates, or in its legislative history, there was no mention that art 152(6) had anything to do with abolishing vernacular schools, or prohibiting the use of non-Malay languages as the medium of instruction in the education system. On the contrary, I find that the first and second defendants' assertion that it was intended to entrench and guarantee the existing status of Malay as the national language and the other languages in the education system of the country to be not without merit.

[50] This is because there is a wider constitutional context to the introduction of art 152(6) of the Federal Constitution. This specific article had been in fact inserted by the said Constitution (Amendment) Act 1971 which was introduced in the aftermath of the sectarian riots of 13 May 1969. This

Constitution (Amendment) Act 1971 had therefore also included other amendments, specifically to arts 10, 63, 72, 153 and 159 of the Federal Constitution. Essentially these concerned four major provisions in the Federal Constitution — on citizenship, national language, the special position of the Malays, and the sovereignty of the Rulers — as well as the prohibition against such matters from being questioned, including in Parliament.

[51] The Prime Minister then, in introducing the Bill to the said Constitution (Amendment) Act 1971, said this:

> Mr Speaker, Sir, it is hardly necessary for me in this House to expound upon the careful and balanced character of the Constitution which was so painstakingly negotiated and agreed upon by the major races in Malaysia before we attained independence. Part III of the Constitution relates to the provisions regarding citizenship. Let those who are citizens of Malaysia under its provisions be ensured clearly that their rights shall not be challenged. This is surely important to them so that whatever fears may have been aroused will not be set at rest.
>
> Now, the basic provisions relating to the acquisition of citizenship represented a fair and balanced compromise. The same careful and balanced approached runs through the other provisions of the Constitution protecting the legitimate rights of all races in Malaysia. Thus, the provisions relating to the special position of the Malays are balanced by the guaranteed protection of the legitimate interests of the other communities and by the citizenship provisions to which I have referred. The provisions relating to the position of Bahasa Malaysia as the sole official and National Language is balanced by the guarantee for the use of the languages of other races other than for official purposes. As regards the provision relating to the sovereignty of the Rulers, surely no one will disagree that their position should never be open to attack or challenge. Any self-respecting people will surely want to ensure that the position of its Rulers should not be subject to debate in the political arena.

[52] It is as such reasonable to state that the background and history of art 152(1) to (5) reveals in fairly unmistakable terms that it is a deliberate result of careful negotiations and delicate compromises. It also represents the apotheosis of a consistently implemented and harmoniously upheld national education policy for an education system tolerable if not acceptable to all, which in the proviso to art 152(1) balances between the position of Malay as the national language while preserving and sustaining the right to use other languages as the medium of instruction, for non-official purposes. The introduction of art 152(6) further ensconces the constitutional balance in the said art 152 as well as other fundamental features of the Federal Constitution pursuant to the Constitution (Amendment) Act 1971.

THE KEY QUESTION ON CONSTITUTIONALITY

[53] Now, it is not disputed that the Education Act 1996 gives statutory recognition to the existence and maintenance of vernacular schools as part of

A the country's national education system. However, in these suits, the plaintiffs are contending that the relevant provisions in the Education Act 1996 to such effect, namely ss 2, 17 and 28, as referred to above, are contrary to the supreme law of the land, which is the Federal Constitution and are therefore unconstitutional.

B

[54] It is true the Constitution does not mention vernacular schools. However, the absence of any such mention is not determinative of the issue either way. It does not necessarily follow that there is no prohibition against vernacular schools. Conversely it does mean that there is no authorisation or sanction for the establishment of vernacular schools.

C

[55] This is because the core issue raised in these two suits in this O 14A hearing is the use of Chinese and Tamil as the medium of instruction in these vernacular schools. This is argued by the plaintiffs to be unconstitutional because the Federal Constitution specifically prescribes Malay as the national language. These suits are therefore about the use of language and this readily attracts the application of art 152(1) of the Federal Constitution.

D

E **[56]** The answer to the main question as to whether the existence and maintenance of vernacular or national-type schools as provided for in ss 2, 17 and 28 of the Education Act 1996 is unconstitutional will accordingly depend on the true interpretation of the provisions of art 152(1) of the Constitution.

F

[57] Whilst there is no mention of vernacular schools or national-type schools in art 152(1), and even though this art 152(1) prescribes that the national language shall be the Malay language, this article however contains two exceptions in its provisos in art 152(1)(a) and (b).

G

The protection in the exception in art 152(1)(a)

[58] The first proviso, in art 152(1)(a), as set out above, states that there is no prevention or prohibition against the using of any other language provided it is not for official purposes, and there is no prevention or prohibition against the teaching or the learning of any such other languages.

H

[59] It is therefore crystal clear that one can *teach* and *learn* languages other than the national language, such as Chinese and Tamil, and I could add that this need not even be undertaken in vernacular or national-type schools. The important point here is that the *use* of another non-national language is also not prohibited subject to the use being not for official purposes.

I

[60] This therefore is the crux of the matter, which is whether adopting Chinese or Tamil as the medium of instruction, such as using these mother tongue languages in the teaching of other subjects, as done in vernacular schools, is a use of a language other than Malay which is protected under art 152(1)(a).

[61] The plaintiffs place considerable reliance on the case of *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243.

[62] In that case, pursuant to s 6 of the Universities and University Colleges Act 1971, the appellant, a company limited by guarantee, had submitted a petition to the Yang di-Pertuan Agong ('YDPA') for the incorporation of Merdeka University. This was rejected.

[63] The Minister of Education mentioned that the reasons for the refusal included that the proposed university would use Chinese as the medium of instruction; that it was meant for students from Chinese independent secondary schools; that it was to be set up by the private sector; and that its establishment would be contrary to the national education policy.

[64] The appellant sought legal redress. It asked for a declaration that the rejection of the petition was unconstitutional, null and void, and that the rejection was an unreasonable and improper exercise of the discretion under s 6 of the Universities and University Colleges Act 1971 ('the UUCA').

[65] The High Court dismissed the action. This was then affirmed by a majority decision of the Federal Court. The issue before the Federal Court as stated by Suffian LP was whether in the exercise of discretion under s 6 of the UUCA, the YDPA and the government took into account relevant considerations, acted fairly, or were misdirected in fact or law and/or made the decision on sufficient material, and whether the decision 'was so unreasonable that no reasonable person could have come to it'.

[66] On the crucial issue whether the proposed Merdeka University is a 'public authority' for the purposes of art 15(2) of the Federal Constitution, the Federal Court observed that art 152(1) prohibits the use of Chinese for official purposes, and that 'official purpose' is defined in art 152(6) to include 'any purpose of a public authority'. In turn 'public authority' is defined in art 160(2) to include 'a statutory authority exercising powers vested in it by federal or state law'.

[67] The Federal Court in *Merdeka University* held that a public authority includes any authority with a public element established by statute and exercising powers vested in it by federal law, such that any university established

under the Universities and University Colleges Act 1971, even if private, would be a public authority, for it 'clearly has the requisite public element, as it is subject to some degree of public control in its affairs and involves a number of public appointments to office in its framework, acts in the public interest and is eligible for grants-in-aid from public funds'.

[68] The Federal Court in *Merdeka University* thus concluded that the said proposed university, if established, would be a public authority, which would therefore mean that the teaching in Chinese in the university would be 'use for an official purpose'. Such use of Chinese as the medium of instruction would thus be constitutionally prohibited.

[69] Now, it should be appreciated that although the case of *Merdeka University* concerns a challenge against the rejection of the establishment of a new university, and not against the existence of vernacular schools, it directly relates to art 152(1) just like in the present case before me. As such, the interpretation on the scope and application of art 152(1) is of significant relevance to the present two suits.

[70] It is apposite, for context, that s 2 of the National Language Act 1963/67 be stated, which reads as follows:

> 2. Save as provided in this Act and subject to the safeguards contained in Article 152(1) of the Constitution relating to any other language and the language of any other community in Malaysia the national language shall be used for official purposes.

[71] It should especially be stated that despite the view expressed by the Federal Court in *Merdeka University* (which was given much emphasis by the plaintiffs before me) that the word 'using' any other language in proviso (a) to art 152(1) cannot also mean 'teaching in' any other language, suggesting therefore that a medium of instruction other than Malay is not protected under the said proviso, the judgment of the Federal Court in *Merdeka University* specifically stated the law in art 152 and the National Language Act 1963/67 on this point to be that no person shall be prohibited or prevented from using Chinese for unofficial purposes.

[72] His Lordship Suffian LP said thus:

> But the crucial question is: would MU be prohibited from teaching in Chinese as the sole or major medium of instruction? It certainly would if it is a public authority, for then the use of Chinese there would be use for an official purpose which the Constitution read together with the National Language Act says is prohibited.

[73] On this point about teaching in other languages, I should also refer to

the other case much relied on by the plaintiffs in *Public Prosecutor v Mark Koding* [1983] 1 MLJ 111 where the accused, a Member of Parliament, was charged for uttering seditious words in the course of his speech in the Dewan Rakyat, an offence under the Sedition Act 1948. In his speech the accused questioned the policy of the government in allowing Chinese and Tamil schools to continue in this country, and even advocated the closure of Chinese and Tamil schools.

[74] He was found not guilty on these main sedition charges and in his judgment, Mohamed Azmi J (as he then was) also considered the constitutionality of vernacular schools, and referred to *Merdeka University.* This passage in *Mark Koding* is especially relevant:

> The question therefore arises as to the true interpretation of proviso (a) to art 152(1). Having regard to the words used in the proviso, vis 'teaching or learning any other language' as opposed to 'teaching or learning *in* any other language', I tend to agree with the restricted meaning as enunciated by Abdoolcader J when dealing with schools or other educational institutions. In my view, under proviso (a), although the National Language shall be the Malay language, the *usage* of any other language other than for official purposes, is guaranteed; so is the *teaching or learning* of any other language in schools, be it Chinese, Tamil, Arabic or English. But there is nothing in proviso (a) to justify the extension of the protection to the operation of schools where the medium of instruction is Chinese, Tamil, Arabic or English. This strict interpretation is consistent with proviso (b) which guarantees the right of the Federal Government or any State Government to preserve and sustain the *use* and *study* of the language of any other community in the Federation. Thus, the preservation and sustenance of *usage* of language of any other community is guaranteed. So is the preservation and sustenance of study of any other community's language, but again there is no justification in extending the guarantee to the preservation and sustenance of study *in* the language of any other community in the absence of specific words to that effect. Any other interpretation of proviso (a) would result in abusing the words used in the proviso. It is absurd for instance to think that the proviso gives constitutional protection to teaching or learning in school where the medium of instruction is Russian or Japanese. To my mind, the protection only extends to language but not to medium of instruction in schools. In other words, no person shall be prohibited or prevented from teaching or learning Chinese or Tamil or, for that matter, any language which is not the national language in any school as a language subject, but such protection does not extend to the teaching or learning in a school where the teaching or learning is *in* any other language. As correctly stated by Abdoolcader J, the omission of the preposition 'in' after the words 'teaching or learning' in proviso (a) makes the distinction necessary. In the event, it is my finding that the Accused is not guilty of sedition when he advocates for the closure of Tamil or Chinese schools. Whether or not such closure is advisable or feasible is, of course, another matter to be decided elsewhere and not in this court. There is nothing unlawful in allowing Chinese or Tamil schools to continue.

[75] This passage, according to the plaintiffs, suggests that teaching in Chinese or Tamil (as the medium of instruction) is not constitutionally protected under art 152(1) of the Federal Constitution.

[76] However, in my view, this observation by the High Court in *Mark Koding*, which follows that of the High Court in *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356 must be read subject to the pronouncement by the Federal Court in *Merdeka University*, as I adverted to above, which is that whether teaching in (as a form of 'using') any other language is constitutionally guaranteed is dependent on whether it is made for official or non-official purposes, as per the words in art 152(1)(a) of the Federal Constitution. And separately, it cannot escape this court's attention that as highlighted by counsel for the defendants before me, the very last sentence in the above passage in *Mark Koding* relied on by the plaintiffs actually stated that there 'is nothing unlawful in allowing Chinese or Tamil schools to continue'.

[77] Lord President Tun Suffian Hashim accordingly formulated the question to be whether the proposed Merdeka University would be prohibited from teaching in Chinese as the medium of instruction, and stated that it would be so prohibited if the university was a public authority, because the use of Chinese there would be for an official purpose, which would be prohibited by the Federal Constitution, within the meaning of art 152(6) which defines 'official purpose' and art 160(2) which defines 'public authority'.

[78] Accordingly, it also follows that teaching in Chinese would not be prohibited if it was not for official purposes, and it would not be for official purpose if the proposed university was not a public authority. Article 152(6) defines 'official purpose' to mean 'any purpose of the government, whether Federal or State, and includes any purpose of a public authority'. The expression 'public authority' is widely defined in art 160(2) and it expressly excludes the Superior Courts, but includes, as mentioned earlier, 'a statutory authority exercising powers vested in it by Federal or State law'.

[79] In its judgment, the Federal Court in *Merdeka University* held that a university established under the Universities and University Colleges Act 1971 has the requisite public element, because it is subject to some degree of public control in its affairs and involves a number of public appointments to office in its framework, acts in the public interest and is eligible for grants-in-aid from public funds. A university can receive grants-in-aid authorised by Parliament under s 11 and for this purpose the Minister of Education would be responsible for the establishment of the campus and for the acquisition of land. In addition, it was stated that under s 3 of the Universities and University Colleges Act 1971 the Minister of Education is responsible for the general direction of higher education and the administration of the Act.

[80] The Minister of Education also has certain functions in relation to student activities and discipline. The constitution of a university too must contain provisions for all matters set out in the Schedule to the Act and these give wide powers to the administration of the university. The appointment of the Chancellor and Vice-Chancellor is to be made by His Majesty YDPA on ministerial advice and after consultation with the Council of the university. His Majesty also has power to amend the constitution of a university at any time and by order exempt, vary or add to any of the provisions of the schedule to the Act.

[81] A university is therefore a 'public authority' within the meaning of art 160(2) where a university is also a statutory authority exercising powers vested by it under federal law. Having Chinese as a medium of instruction in the proposed university would as such be a use of the language for an 'official purpose', which use is therefore prohibited under art 152(1) and not protected under art 152(1)(a).

[82] Accordingly, just like in the case of *Merdeka University* the question to be asked in the two suits before me is whether the use by the vernacular schools of a language other than Malay as the medium of instruction is for 'official purpose'. If the answer is in the affirmative, it is prohibited because it would be unconstitutional.

[83] In order to answer this question, and to follow the approach of the Federal Court in *Merdeka University*, reference must again be made to the definition of 'official purpose' in art 152(6) which means among others, any purpose of a public authority. If a vernacular school is a public authority, then the use of Chinese or Tamil would be for an official purpose, and therefore prohibited. And to address the question whether a vernacular school is a 'public authority', regard also must be had to art 160(2) which defines a 'public authority' to include 'a statutory authority exercising powers vested in it by Federal or State law'.

[84] Guided by the approach in *Merdeka University,* and in order to establish that a vernacular school is a statutory authority the plaintiffs here must establish that a vernacular school has the requisite public element, and that it is exercising powers under the Education Act 1996.

[85] In my judgment, based on the legislative scheme of the Education Act 1996, unlike the proposed Merdeka University or a university established under the Universities and University Colleges Act 1971, a vernacular school or a national-type school under the Education Act 1996 does not sufficiently exhibit the requisite public element to be validly construed as a statutory

authority. And neither can it be said that a vernacular school is a statutory authority which exercises the powers vested in it by the Education Act 1996.

[86] Vernacular schools essentially provide primary-level education, and the powers and functions under the Education Act 1996 are largely exercised by the Minister of Education.

[87] A vernacular or national-type school is only required to be registered with the Registrar General pursuant to s 79(1) and (2) of the Education Act 1996. In turn the Registrar General may impose such terms and conditions as he deems fit when registering an educational institution such as a vernacular school as stated in s 79(3). The Registrar General is also empowered under s 84 to refuse a registration of an educational institution on seven specified grounds, none of which concerns the use of Chinese and Tamil languages. The Registrar General may even cancel the registration of a vernacular school on grounds specified under s 87(1)(a) to (f).

[88] Unlike in the Universities and University Colleges Act 1971, the Minister of Education does not have the responsibility to acquire land for vernacular school and there are no similar provisions to ss 15A and 15D of the Universities and University Colleges Act 1971 concerning student activities and discipline in the Education Act 1996.

[89] A vernacular school does not acquire the status as a body corporate upon establishment like a university under s 7 of the Universities and University Colleges Act 1971, and there is no provision for the establishment of a vernacular school to be submitted to Parliament such as under s 6 of Universities and University Colleges Act 1971 which mandates the order declaring the establishment of a university to be laid before both Houses of Parliament.

[90] In addition, regard must also be had to the provisions of art 12(1) of the Federal Constitution on rights in respect of education. It reads:

> 12 Rights in respect of education
>
> (1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth —
>
> (a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or
>
> (b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).

[91] This constitutional provision, not discussed in *Merdeka University*, prohibits discrimination in the administration of an educational institution maintained by a public authority — which therefore clearly draws a distinction between an educational institution which admits pupils and students on the one hand and a public authority which maintains and funds such educational institution on the other hand.

[92] In other words, a vernacular school, which is an educational institution under the Education Act 1996 cannot at the same time be the public authority which maintains the school in the first place. In this context, given the wide definition of public authority in art 160(2) which includes the Federal Government, there is reasonable basis to contend that the public authority for the vernacular schools is the Minister of Education.

[93] For all these reasons, in my judgment, a vernacular school is neither a statutory authority nor a public authority, and consequently its use of a non-Malay medium of instruction for teaching (teaching in) is not for an official purpose, and is therefore protected by the proviso or exception in art 152(1)(a) of the Federal Constitution.

[94] Quite apart from this finding that the present use of Chinese and Tamil as the medium of instruction in vernacular schools is not for official purpose, there are other considerations which further distinguish *Merdeka University* from the suits before this court.

[95] For one, the issues before this court and the reliefs sought are completely different in nature and scope from in *Merdeka University*. In that case, the challenge was against the exercise of statutory discretion under s 6 of the Universities and University Colleges Act 1971 whereas here the suits seek to declare the relevant sections in the Education Act 1996 to be unconstitutional for sanctioning the establishment and maintenance of vernacular schools, and to abolish vernacular schools within six years.

[96] Also, it is patently clear that the status of vernacular schools, now sought to be declared unconstitutional by the plaintiffs, is not comparable to the petition by Merdeka University. The former have a long history of existence and recognition as part of the national education system, as discussed above. Merdeka University on the other hand was a first attempt at establishing a private university with essential features and elements not hitherto recognised.

[97] Moreover, the decisions of the High Court and the Federal Court in *Merdeka University* which construed art 152(1) of the Constitution did not discuss, let alone examine the existence of vernacular schools vis a vis art 15(2) of the Federal Constitution. The Education Act 1961 in force then too was not

even touched on in *Merdeka University*.

[98] And further, in *Merdeka University*, the Federal Court emphasised that in reaching its conclusion the court was greatly influenced by the scheme of the Universities and University Colleges Act 1971 which is peculiar to Malaysia in that it prohibits the establishment of a university within its context except in accordance with its provisions therein. This legislation has absolutely no application to vernacular schools.

The protection in the exception in art 152(1)(b)

[99] As mentioned earlier, art 152(1) contains one other proviso or exception which is found in art 152(1)(b). This states that:

> Nothing in this Clause shall prejudice the right of the Federal Government or of any State Government to preserve and sustain the use and study of the language of any other community in the Federation.

[100] This proviso was not specifically examined by the High Court and the Federal Court in *Merdeka University*. This, it must be emphasised, is a right which belongs to and exercisable by the government. As such, if the Federal Government wishes, it has the power to preserve and sustain the 'use' and 'study' of Chinese or Tamil in this country.

[101] It bears emphasis that this right to preserve and sustain is especially pertinent to vernacular schools precisely because unlike the case of *Merdeka University* which was a fresh application for the establishment of a university under the Universities and University Colleges Act 1971, vernacular schools unquestionably pre-date independence and the Federal Constitution, and I reiterate have long been recognised in the legislative framework of the country's education system, previously in the Education Ordinance 1952, the Education Ordinance 1957, the Education Act 1961, and now, the Education Act 1996.

[102] The exercise of this constitutional right by the government is not only confined to the study of these languages, but based on the words of art 152(1)(b) also extends to the use of such languages, which includes, in my view, as a medium of instruction. Unlike the proviso in art 152(1)(a) there is in art 152(1)(b) no qualification in terms of the use being for unofficial purpose to justify constitutional safeguard.

[103] It is after all well-settled, as referred to earlier, that in cases involving fundamental constitutional rights such as the right in respect of education which is found in art 12 and placed under Part II of the Federal Constitution on Fundamental Liberties, the courts will interpret the relevant constitutional

provisions generously and liberally. In addition, applying a prismatic approach to the construction of constitutional provisions, I would construe *the use* of such languages referred to in art 152(1)(b) in so far as it concerns vernacular schools to encompass the use of Chinese or Tamil as a medium of instruction to teach other subjects.

[104] In its administration and enforcement of the Education Act 1996, including the provisions on national-type schools in ss 17 and 28, the government is therefore continuing to preserve and sustain the use and study of the languages of the communities in the country. This is manifestly protected under art 152(1)(b) of the Constitution.

[105] This interpretation is also in consonance with the principle that constitutional provisions must be interpreted and properly appreciated in light of their historical background and context in order to find out the original intention of the drafters. The Federal Court in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 referred with approval to the observation made by the Privy Council in an appeal against the decision of the Supreme Court of Mauritius in *Matadeen and Others v MGC Pointu and Others (Mauritius)* [1998] UKPC 9, a decision I referred to earlier, that the background of a constitution is an attempt at a particular moment in history to lay down an enduring scheme of government in accordance with certain moral and political values.

[106] I have in considering the relevant historical document on this subject made mention that it is on record that the Barnes Report 1951 had recommended the creation of a singular national public-school system with a bilingual education in the Malay and English languages, that the Fenn-Wu Report 1951 on the other hand recommended trilingual education — Malay, English, and Chinese/Tamil — in Chinese and Tamil-medium schools, and that the Razak Report in 1956 introduced a measure of compromise where vernacular schools were allowed to retain the use of mother tongue languages while Malay would be the main medium of instruction in national schools.

[107] It is readily observed that the Razak Report which included the proposal that the national education system should comprise standard primary schools with Malay as the medium of instruction, as well as standard-type primary schools using English, Tamil or Chinese as the medium of instruction was accepted by the Federal Legislative Council in June 1956, and subsequently reflected in the Education Ordinance 1957. Crucially, the White Paper later proposed changes to the Reid Commission recommendations in respect of national language which resulted in the provisos now contained in the present version of art 152(1)(a) and (b) of the Constitution.

[108] It is worthy of emphasis that these historical records and background therefore demonstrated that before independence, the establishment and existence of vernacular schools have always had a long history of recognition and acceptance in this country. The position of the Malay language as the national language has never been in doubt and at the same time expressly intended not to affect the use of other languages in the education system of the country. The White Paper clearly shows that the provisos to art 152(1) were expressly incorporated for the specific purpose of preserving and sustaining the use of other languages in the education system.

[109] Further, I reiterate that in the discussions and proposals towards making Malay language as the sole official language, the scope of matters considered in the text of 'official language' were the legislative debates, authoritative texts of law, and proceedings in court. It is significant that no reference was made to the languages used in the education system.

[110] The Rahman Talib Report, also referred to earlier, subsequently documented among others that the continued existence and funding of vernacular schools is part of the promise to preserve and sustain the languages and cultures of Malaya. The Rahman Talib Report was the foundation of the Education Act 1961. Sections 2, 20 and 21 of the Education Act 1961 are as stated earlier, the precursor to the statutory provisions in ss 2, 17 and 28 in the Education Act 1996 which the plaintiffs now argue to be unconstitutional.

[111] In light of the constitutional and legislative background history on the subject, it can be fairly said that the purpose and intent of art 152 was not to prohibit the use of other languages in vernacular schools. Instead the provisos to art 152(1) were inserted to achieve the opposite effect.

[112] In addition, as stated earlier, art 152(6) which introduced the definition of 'official purpose' was inserted by way of the Constitution (Amendment) Act 1971 to clarify the extent to which the national language must be used for 'official purposes'. The historical and legislative background behind this amendment as evidenced from Hansard too demonstrated the intention to give greater effect to the national education policy, which included to preserve and entrench the use of other languages in vernacular schools.

[113] One important observation is that vernacular schools are not expressly included as a 'public authority' in art 160(2) of the Federal Constitution. But more noteworthy is that throughout the course of the Parliamentary debates, there was no allusion let alone any mention that the new art 152(6) had the intention of abolishing vernacular schools, or prohibiting the use of non-Malay languages as the medium of instruction in vernacular schools. As stated earlier, the introduction of art 152(6) was also part of the constitutional amendments

which also involved other key aspects of the Federal Constitution in arts 10, 63, 72, 153 and 156 on citizenship, national language, the special position of the Malays, and the sovereignty of the Rulers.

[114] Article 152(1) may therefore be said to represent a constitutional balance between the status of Malay language as the national and official language and the right to preserve and sustain and use other languages in the education system of the country. It is an important and fundamental feature of the Federal Constitution.

[115] Additionally, consistent with the proviso in art 152(1)(b) of the Federal Constitution on the right of the government to preserve and sustain the use and study of any language, it is also observed that the Parliament derives its legislative power from art 74 of the Federal Constitution which provides that Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List, which is the First or Third List set out in the Ninth Schedule to the Federal Constitution.

[116] It is well-established that the function of the entries in the Legislative Lists in the Ninth Schedule is not to confer powers of legislation, but merely to demarcate the fields in which Parliament and the State Legislature may operate. The entries must be interpreted liberally and not restrictively, and that each entry extends to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in it.

[117] Although the context may not be the same, as decided more recently in *Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor* [2020] 1 MLJ 398 the Federal Court has ruled that as s 28 of the Education Act 1996 allows the Minister to establish national schools and national-type schools and s 17 of the same Act permits such schools to be exempted from using the national language as the main medium of instruction subject to the national language being taught as a compulsory subject, these are clearly areas in which Parliament may make laws with respect to the matter on Education. The matter on Education is clearly spelt out under item 13 of the First List in the Ninth Schedule which includes elementary education, as follows:

LIST I — FEDERAL LIST

13. Education, including —

(a) Elementary, secondary, and university education; vocational and technical education; training of teachers; registration and control of teachers, managers and schools; promotion of special studies and research; scientific and literary societies;

(b) Libraries; museums; ancient and historical monuments and records; archaeological sites and remains.

[118] In light of the context as appearing above, I think it reasonable to state that the word 'elementary' refers to primary education for six consecutive years, to which vernacular schools belong.

[119] I acknowledge and the plaintiffs did highlight that certain of the historical records show that the use of languages other than Malay in the national education system was suggested to be a temporary arrangement. Indeed, the Razak Report did state that the ultimate objective of the education policy in this country must be to bring together the children of all races under a national educational system in which the national language is the main medium of instruction, whilst recognising that progress towards this goal cannot be rushed and must be gradual.

[120] However, such statements were never enacted in any constitutional or legislative framework. Instead a scrutiny of the entirety of art 152 itself demonstrates that consistent with the constitutional prescription that the Malay language shall be the national language in art 152(1), transitional arrangements which involved the ten-year grace period to transition from English to the Malay language had been enacted in art 152(2) for proceedings in Parliament and State Legislative Assembly, in art 152(3) for authoritative texts of Bills and Acts of Parliament, and in art 152(4) for proceedings in the Superior Courts and as well as in art 152(5), for the proceedings in the subordinate courts to be in English until Parliament provided otherwise.

[121] This therefore clearly suggests that the drafters of our Constitution did not intend for such a similar transition for vernacular schools, since they could have specifically enacted to such effect in art 152. Yet art 152 makes no mention at all of any gradual abolition of the use of Chinese or Tamil as a medium of instruction in vernacular schools despite being part of the education system in force at the time of the coming into force of our Constitution.

[122] In light of the afore-stated reasons, my answer to the first question is in the negative.

Second question — Whether the establishment and existence of vernacular schools infringe arts 5, 8, 10, 11 and 12 of the Federal Constitution

[123] It is noteworthy to state that arts 5 to 13 deal with the fundamental liberties as guaranteed under the Federal Constitution. Article 5 is on the 'liberty of the person' whereby no person shall be deprived of his life or personal liberty save in accordance with the law. Article 8 concerns 'equality', providing that all persons are equal before the law and entitled to the equal protection of the law.

[124] Article 10 concerns the right of citizens to freedom of speech and expression, to assemble peaceably without arms, and to form associations. Article 11, on freedom of religion states that every person has the right to profess and practice his religion and, subject to cl (4), to propagate it, whilst art 12, referred to earlier, is rights in respect of education, which essentially provides there shall be no discrimination against any citizen on the grounds only on religion, race, descent or place of birth.

[125] Given that the use of Chinese and Tamil in vernacular schools as a medium of instruction is, as discussed earlier, constitutional since it is protected under the exceptions in art 152(1)(a) and (b) of the Federal Constitution, there is no basis to contend that the establishment and existence of vernacular schools is inconsistent with or infringe arts 5, 8, 10, 11 and 12 of the Federal Constitution. It cannot be correct that the constitutionally guaranteed right on such use of language being inconsistent with any of arts 5, 8, 10, 11 and 12 of the Federal Constitution.

[126] In any event, it has not been shown by the plaintiffs in what manner the establishment and existence of the vernacular schools has violated the fundamental liberties of any person guaranteed in the said articles.

[127] There is also the submission by counsel for the plaintiffs that vernacular school students are at a disadvantage in the job market because of limited Bahasa Malaysia proficiency. This I find to be wholly unsubstantiated and also somewhat incongruous given that vernacular schools system concerns only primary education, and where as stated earlier, Bahasa Malaysia is a compulsory subject under s 17(2) of the Education Act 1996, one of the statutory provisions which the plaintiff alleged to be unconstitutional.

[128] I must emphasise that enrolment in a vernacular school is after all a matter of choice. It is a purely voluntary act, with no compulsion in law whatsoever, whether one wishes to study in a national-type school or national school. It is therefore difficult to fathom in what fashion the establishment and existence of Chinese and Tamil vernacular schools would infringe the fundamental liberties or rights of any person under the Federal Constitution.

[129] Furthermore, the affidavits filed by the plaintiffs to support their case on this subject disclose specific incidents suggestive of discriminatory practice which however appear very isolated and not sufficiently substantiated. Those who felt aggrieved should seek the appropriate remedy in court, instead of to seek the closing down of vernacular schools, arguably a most disproportionate response. Any contention of constitutional violation arising from these incidents ought thus to be litigated at the correct forum, and not collaterally in these suits before me.

[130] Moreover, other affidavits which exhibited the opinions of the deponents on the advantages or disadvantages of vernacular schools are plainly not relevant to the interpretation of the constitutionality of the statutory provisions in question, which in any event is for this court to construe, as it has done.

[131] The plaintiffs' claims are not merely concerned with challenging the manner of the implementation of art 152. They go further and seek to abolish vernacular schools and the right of other languages to exist as a medium of instruction in the education system. Given my finding on the true construction of art 152, it is of relevance to observe that art 10(4) also authorises enactment of laws prohibiting the questioning of among others, any right or status protected by art 152, as an integral feature of the protection of entrenched fundamental pillar of the constitutional balance in our Federal Constitution.

[132] It would also not be right to hold that all the students who had gone through the vernacular school system had done so through unconstitutional means, not to mention the status and fate of the pupils in present enrolment, notwithstanding that the plaintiffs proposed that vernacular schools be phased out entirely within six years.

[133] In light of the afore-stated reasons, my answer to the second question is in the negative.

The two other questions — Justiciability and locus standi

[134] As I stated earlier there are two other questions, most notably proposed by the first and second defendants. These are the locus standi and justiciability issues. I have earlier ruled that these two are subsumed under the two main questions. On locus standi, I accept that if the plaintiffs cannot demonstrate locus standi, this claim ought to be dismissed *in limine*. The argument by the defendants — the 13th defendant in particular — is that none of the plaintiff associations nor their members are students, past of present of the vernacular schools in this country. They have absolutely no relations to vernacular schools. How therefore would they be affected by the continued existence of the vernacular schools, the 13th defendant asked.

[135] The 13th defendant referred to the leading case on locus standi, the Supreme Court decision in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, and in my view, regard to the following other cases is no less significant. The first is the Federal Court decision in *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor* [2021] 6 MLJ 68; [2021] 7 AMR 533 where it was held:

(8) For good measure, I find that the questions posed are in fact abstract and hypothetical and for other reasons, academic and must not be entertained under the special case route. *While the appellant may have locus standi to pitch his grievance and approach the court for redress, he must nevertheless establish how he is affected for otherwise the courts will be answering questions in vacou and rendering a decision which may cause injustice to future cases*. (Emphasis added.)

[136] The other is the observation by the Federal Court in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 as follows:

... Although it is not necessary for a plaintiff who seeks relief by way of declaratory judgment to show that he has a present cause of action, he must be somebody with such an interest in the subject-matter of the action as to justify his seeking relief.

[137] The defendants argued that the plaintiffs are devoid of both the initial or threshold locus standi, as well as substantive locus standi (see the Federal Court decision in *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145).

[138] I am mindful of the thrust of the plaintiffs' argument against lack of locus standi that they are in these suits challenging what they consider as violations of constitutional safeguards. They relied among others, on a decision of the Court of Appeal in *Manoharan a/l Malayalam & Anor v Dato' Seri Mohd Najib bin Tun Hj Abdul Razak & Ors* [2013] 5 MLJ 186 which held that in a situation where there was a bona fide complaint by a concerned citizen that there had been a violation of the Constitution by the government or its agent, the principles on locus standi would not apply.

[139] As for whether matters raised in these suits concerned non-justiciable issues which are not capable of judicial determination, similarly the plaintiffs submitted that there can be no objection on grounds of non-justiciability because they contended that it would be necessary to strike down government policies which are constitutionally invalid. Reference was made to a decision of the Federal Court in *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321, particularly the following passages from the judgment delivered by Raus Sharif PCA (later Chief Justice):

[20] In the present case, the second respondent had clearly explained, why he decided the way he did with regard to the distribution of the Special Constituency Allocation for the Sungai Siput constituency. Clearly, what was decided by the second respondent hinged on matters relating to policy and thus we would dissuade ourselves from entering into the realm which belongs to the executive. Courts must be wary of unduly extending its judicial arms to policy matters which are exclusively within the domain of the executive. Unwarranted usurpation and transgression by the judiciary into the realm of the executive and vice versa will bring about disrepute

to our system of government which upholds the separation of powers between the three main components vis a vis the executive, the legislature and the judiciary.

[21] Of course, in appropriate cases the courts as the custodian of law and justice must not remain idle. Where the policy or action of the executive is inconsistent with the Constitution and the law or in any manner arbitrary, irrational or there are elements of mala fides and abuse of power, the court is duty bound to interfere. Whether or not the court should interfere clearly depends on the facts and circumstances of each case. On the facts and circumstance of this case we are inclined to agree with the Court of Appeal that the decision of the first respondent and/or the second respondent is not amenable to judicial review.

[140] These are important considerations. However, as I had ruled earlier, these questions are subsumed under the two main and substantive questions which in my view ought to be dealt with first. However, now that I have answered them both in the negative, I think it is unnecessary for me to address the issues on locus standi and non-justiciability.

CONCLUSIONS

[141] Vernacular schools were already in existence prior to Merdeka and fully acknowledged by the Ordinances then in force. And from independence until the enactment of the Education Act 1996 — for almost four decades — the existence of vernacular schools was by and large unchallenged and undisputed. The Education Act 1996 undoubtedly maintained the continuous recognition of vernacular schools.

[142] It is now documented that there are presently more than 1800 vernacular schools throughout the country, with about half a million students of different racial composition in total (including Malay pupils). In light of the finding that a vernacular school is not a public authority, and in view of the historical and legislative background to art 15(2) of the Federal Constitution and the intention of the framers of the Federal Constitution at the material time, the use of a non-Malay medium of instruction for teaching in Chinese and Tamil vernacular schools is not for an official purpose and is not an infringement of art 152(1).

[143] Such use of the language is therefore not unconstitutional and is protected under the Federal Constitution by virtue of both provisos (a) and (b) to art 152(1). A true and proper interpretation of these provisos in art 152(1) does not prevent the establishment and maintenance of vernacular schools as national-type schools which also use the National Curriculum as adopted by all schools in the National Education System.

[144] These suits by the plaintiffs, which challenge the constitutionality of the relevant provisions of the Education Act 1996 also attract the application of the presumption of constitutionality. There are two related aspects to this. First, the burden is upon the plaintiffs who challenge these statutory provisions to show that there has been a clear transgression of the constitutional principles (see *Public Prosecutor v Su Liang Yu*). This, it has been determined and discussed earlier, the plaintiffs have clearly not succeeded.

[145] Secondly, the courts will generally lean towards the constitutionality of a statute on the premise that Parliament understands and correctly appreciates the needs of the people, that laws are directed to problems made manifest by experience and that any discriminations are based on adequate grounds and that a legislature would not deliberately flout a constitutional safeguard (see the Federal Court decision in *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor* [2021] 6 MLJ 68; [2021] 7 AMR 533).

[146] This has also been described as judicial deference that the court should accord to the judgment of the democratically elected Legislature on matters that are placed within the domain of the Legislature. It is also an important facet to the doctrine of the separation of powers. Lord Hoffmann in a majority judgment of the House of Lords in the case of *Regina v British Broadcasting Corporation ex parte Pro-Life Alliance* [2003] 2 All ER 977 said:

> 75. My Lords, although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.
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> 76. This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. It is reflected in art 6 of the Convention. On the other hand, the principle that majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.

[147] This is also why this judgment is focussed predominantly on the interpretation of art 152(1) and does not delve into the role of national language in the promotion of national identity and unity, or in our continuous journey of nation-building. Critical questions on the standard of learning and teaching in all schools, on whether the national education system is sufficiently inclusive, and whether academic progression and excellence takes priority over all else are matters best dealt with by the Executive and the Legislature.

[148] In conclusion, the answers to the two main questions in these two suits — on whether ss 2, 17 and 28 of the Education Act 1996 are inconsistent with art 152 and whether the establishment and existence of vernacular schools infringe arts 5, 8, 10, 11 and 12 of the Federal Constitution are *both in the negative*. The claims by the plaintiffs in both suits (Suit 84 and Suit 2) are therefore dismissed. I make no order as to costs.

Suits dismissed.

Reported by Ashok Kumar